No. 45827-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

AMBER DIANE ROBBINS,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 13-1-01314-4
The Honorable Bryan Chushcoff, Judge

OPENING BRIEF OF APPELLANT

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2. The trial court judge unconstitutionally commented on the State's evidence and conveyed his opinion of the evidence to the jury through Instruction 14 and Instruction 16.

3. The State failed to meet its burden of proving beyond a reasonable doubt all of the elements of the crime of identity theft.

4. The State failed to present sufficient evidence, beyond mere possession, to prove that Amber Robbins possessed items of identification and financial information belonging to other people with the intent to commit a crime.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the trial court judge unconstitutionally comment on the State's evidence and convey his opinion of the evidence to the jury through Instruction 14 and 16, which listed and defined the only crime the judge believed Amber Robbins intended to commit? (Assignments of Error 1 & 2)

2. Where the State's evidence established only that Amber Robbins possessed items of identification and financial

information belonging to other people, did the State fail to present sufficient evidence to prove beyond a reasonable doubt that Amber Robbins possessed these items with the intent to commit a crime? (Assignments of Error 3 & 4)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Amber Diane Robbins by Amended Information with one count of unlawful possession of a controlled substance (RCW 69.50.4013(1)), and four counts of second degree identity theft (RCW 9.35.020(3)). (CP 4-6) The trial admitted statements made by Robbins to the arresting officer, and denied Robbins' mid-trial motion for a directed verdict of not guilty. (RP 82-89, 217-33; CP 19-33, 92-95)

The jury convicted Robbins as charged. (RP 304-05; CP 63-67) Because Robbins has no prior criminal history, the trial court imposed a sentence at the low end of the standard range, totaling 12 months plus one day. (RP 323; CP 68-70, 74, 78) This appeal timely follows. (CP 86)

B. SUBSTANTIVE FACTS

On March 28, 2013, Puyallup Police Sergeant Joseph Pihl had just completed a traffic stop in a Chevron Parking lot, when he

happened to notice a woman pumping gas into her car at one of the pumps. (RP 126-27) Sergeant Pihl thought that the woman seemed startled to see him, and she looked away quickly and avoided eye contact with him. (RP 127) He found her behavior to be suspicious. (RP 127) He ran the license plate for the woman's car, and found that the registered owner, Cynthia Robbins, possibly had an active arrest warrant. (RP 128-29) Sergeant Pihl thought Cynthia Robbins' photograph matched the woman he saw, so he decided to make contact. (RP 129)

Sergeant Pihl and a second officer, Dylan Rice, approached the woman's car. (RP 130) Sergeant Pihl contacted the woman, who was at that point sitting in the driver's seat. (RP 130) He asked the woman if she was Cynthia Robbins. (RP 130) The woman replied that she was not, and that Cynthia Robbins is her mother. (RP 130)

Sergeant Pihl asked the woman for identification to verify that she was not Cynthia Robbins. (RP 131) According to Sergeant Pihl, the woman reached into the back seat and grabbed a purse, put it on her lap, and searched through it for a piece of identification. (RP 131) She did not find one, but then reached into her pants pocket and was able to present Sergeant Pihl with a driver's license

identifying herself as Amber Robbins. (RP 131-32)

Sergeant Pihl testified that Robbins then volunteered that she also had an arrest warrant. (RP 133) Sergeant Pihl then contacted dispatch and confirmed Robbins' warrant, then asked Robbins to exit the vehicle. (RP 133) Sergeant Pihl asked for and obtained Robbins' consent to search her car for weapons or contraband. (RP 134-35, 136; Exh. P5)

Officer Rice conducted the search while Sergeant Pihl and Robbins stood at the back of the car. (RP 136, 166) The officers testified that Robbins acknowledged that the purse was hers, and told the officers there was heroin inside of it. (RP 139, 156, 167, 168) The officers testified that Robbins reached into the purse and pulled out a film canister, which contained a substance that later tested positive for heroin. (RP 123-24, 139, 168; Exh. 20)

The officers also found numerous identification cards, credit cards, and blank checks bearing the names of people other than Amber Robbins. (RP 170-76) Officer Rice testified that Robbins told him she found the items in a dumpster behind a residence. (RP 176) Robbins also told the officers that the drugs were not hers. (RP 157, 158)

Misty Buttry, Mary Lynn Foreman, Mary Lynn Pratt, and

Victoria Roberts testified that their wallets or personal items had been stolen within the last several months. (RP 192, 195, 200, 214-15) They each identified driver's licenses and/or social security cards and/or credit cards as items that had been stolen. (RP 191-92, 198-99, 213-14) Though Pratt believed she had met Robbins once at her home, none of the other women knew Robbins. (RP 192-93, 195-96, 201, 215)

Robbins testified that the purse belonged to her friend Sarina, who was in the car earlier that day and had forgotten to take it when Robbins dropped her off. (RP 248-49) She told the officers there might be drugs inside the purse, but only because she knew Sarina was a drug user. (RP 253) Robbins testified that she did not reach for the purse to look for her identification, that she did not know what was inside the purse, and that she agreed to allow the officers to search the car because she did not think there was anything illegal inside. (RP 248, 249, 251-52)

IV. ARGUMENT & AUTHORITIES

A. THE JUDGE'S INSTRUCTIONS TO THE JURY SUGGESTING THAT ROBBINS MAY HAVE INTENDED TO COMMIT A THEFT AND DEFINING THE CRIME OF THEFT WERE AN IMPROPER COMMENT ON THE EVIDENCE AND A MISSTATEMENT OF THE LAW.

An identity theft conviction requires proof that the defendant

knowingly obtained, possessed, used, or transferred a means of identification or financial information of another person with the intent to commit, or to aid or abet, any crime. RCW 9.35.020(1). In this case, the State presented no evidence that Robbins used or transferred any of the identification or financial information. The evidence showed only that Robbins possessed items belonging to the four victims listed in the four counts of identity theft, and of several other unidentified individuals. (RP 170-76)

The judge believed that the only crime Robbins could have committed or intended to commit was theft. (RP 233-34, 235-36, 239-40) The judge reasoned that, while Robbins did not use the identities or financial information, she kept items that clearly did not belong to her and did not immediately turn them over to the authorities or return them to their rightful owners. (RP 233-34, 235-36, 239-40) As the judge explained:

> Since there was no evidence of use, what is the other crime? . . . What is it for? It might be to commit theft, but the actual possession of the cards themselves is potentially a theft. Do you see what I'm saying? Because you are keeping something that you knew was lost, and you keep it to yourself. That's a theft.

(RP 234) The judge continued:

> There is no reason to know that she was going to actually use it to defraud somebody, if you will, of

> their money through any means at all, but merely having these items that could be sold to somebody else might well do that same thing.
>
> While you can't necessarily say that her intent was to do those things . . . the documents themselves have intrinsic value and are also intrinsically not hers. On their face, they are owned by somebody else. . . .
>
> . . . She had it for some period of time. When the police arrived, the first thing that she said -- she didn't say to them was anything like, gosh, I'm glad to see you because I'm having this stuff that I want to return to their rightful owners, and you can help me out with that.
>
> I don't hear anything else from the State, and I think it is important . . . that the jury not be allowed to speculate as to what those things are. The evidence only supports theft, I think, it terms of the circumstantial evidence and the direct evidence and what it implies.

(RP 239-40) Because, in the judge's opinion, theft was the only potential crime that the State proved Robbins intended to commit, the judge felt that the jury should be given direction from the court, otherwise they would be allowed to "guess" and "speculate." (RP 233-34, 235-36)

Accordingly, the trial court proposed including an instruction defining the crime of theft. (RP 233) The State and defense both objected, for different reasons. The State argued that it was not required to plead or prove which specific crime Robbins intended to commit. (RP 235) The defense objected because they did not defend against the theory that Robbins intended to commit a theft,

and because it might be confusing to the jury to have the crime of simple theft defined without explaining that it was different from identity theft. (RP 236, 246, 266-67, 271) Ultimately, the State proposed that the court include language in the definitional instruction, stating that the crime of identity theft occurs when a person intends to commit any crime "such as theft." (RP 242) The trial court agreed with the State, and also allowed Robbins to reopen her defense case and testify on her own behalf in order to address the idea that she intended to commit a theft in addition to simply possessing the identities and financial information of other persons. (RP 237-38, 245-46)

The trial court subsequently included the following two instructions to the jury:

> INSTRUCTION NO. 14
>
> A person commits the crime of identity theft in the second degree when, with intent to commit any crime, such as theft, he or she knowingly obtains, possesses, uses, or transfers a means of identification or financial information of another person, living or dead, and obtains credit, money, goods, services or anything else that is $1500 or less in value or does not obtain anything of value.

(CP 51, also attached in the Appendix)

> INSTRUCTION NO. 16
>
> Theft means:
>
> - to wrongfully obtain or exert unauthorized

control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services; or

- to appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive that person of such property or services.

(CP 53, also attached in the Appendix) These instructions were a clear and improper comment on the evidence.[1]

Jury instructions are reviewed de novo, within the context of the jury instructions as a whole. State v. Pirtle, 127 Wash.2d 628, 656, 904 P.2d 245 (1995). Art. IV, § 16 of the Washington State Constitution, states that "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Art. IV, § 16 therefore prohibits a judge from conveying to the jury his or her personal attitudes regarding the merits of the case. State v. Foster, 91 Wn.2d 466, 481, 589 P.2d 789 (1979).

"'All remarks and observations as to facts before the jury are positively prohibited.'" State v. Francisco, 148 Wn. App. 168, 179, 199 P.3d 478 (2009) (quoting State v. Bogner, 62 Wn.2d 247, 252,

[1] Robbins' counsel did object to the inclusion of these instructions, though not specifically on these grounds. (RP 236, 246, 266-67, 271) However, judicial comments on the evidence are manifest constitutional errors that may be raised for the first time on appeal. State v. Lampshire, 74 Wn.2d 888, 893, 447 P.2d 727 (1968); State v. Levy, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006).

382 P.2d 254 (1963)). It is improper even where the court's personal feelings on an element of the offense are merely implied. State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970); State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968).

In this case, the judge believed that the State's evidence could only establish that Robbins intended to commit theft. (RP 233-34, 235-36, 239-40) So the judge added the "such as theft" language to the identity theft definitional instruction, and also included an instruction defining the crime of theft. The judge told the parties that he meant to restrict and direct the jury's deliberations, to prevent the jury from guessing or speculating on what crime Robbins may have intended to commit. (RP 235, 240) The judge clearly intended to comment on the evidence.

And the judge's intention was obvious in the instructions. The definitional instruction and the to-convict instruction in this case both state that Robbins is guilty of the crime of identity theft if she possesses the prohibited items with the intent to commit "any crime." (CP 51, 53) This is consistent with both the identity theft statute, the pattern jury instructions, and case law interpreting the crime as not

requiring the State to plead or prove the intended crime.[2] But by using the "any crime" language, and then suggesting theft as a possible crime, the court was clearly commenting on the quality and sufficiency of the State's evidence. Through these instructions, the judge suggested to the jury what crime it could and should consider when deciding if this element of the crime of identity theft had been proved, and improperly conveyed to the jury his personal attitude towards the State's evidence.

Judicial comments are presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. State v. Lane, 125 Wn.2d 825, 838–39, 889 P.2d 929 (1995); Lampshire, 74 Wn.2d at 892. In this case, the prejudice is obvious. A primary dispute at trial was whether or not the State proved that Robbins intended to commit another crime when she possessed the identification cards and financial information. Any suggestion to the jury that the judge believed that the State's evidence proved that she did intend to commit another crime is highly

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[2] See RCW 9.35.020(1); WPIC 131.05, WPIC 131.06; State v. Fedorov, -- Wn. App --, 324 P.3d 784 (2014) (the State is not required to state the specific crime a defendant intended to commit in order to secure conviction for second-degree identity theft, rather, it is only required to establish that a defendant intended to commit any crime with the identity of a specific, real person).

prejudicial.

The judge's instructions were also confusing, logically inconsistent, and an incorrect statement of the law. The judge's insertion of the phrase "such as theft" and his inclusion of the instruction defining theft as the possession of items belonging to another person, allowed the jury to convict Robbins of identity theft for possessing items with the intent to commit theft of the same items. The jury was given the confusing and inaccurate message that Robbins could be found guilty of identity theft if she possessed the identification cards and financial information, with the intent to possess the identification cards and financial information. And by implying that the jury could find Robbins guilty of identity theft based simply on the fact that she possessed these items, the instructions misstate the law. *See* State v. Vasquez, 178 Wn.2d 1, 7-8, 309 P.3d 318 (2013) (where a crime requires proof of intent to commit an act, bare possession alone is not sufficient).

The jury was told it could convict Robbins without finding that she intended to use, sell, or otherwise profit, at the expense of the individuals from whom the identification or financial information had

been taken, which is what the identify theft statute seeks to address.[3] The misstatement thereby also relieved the State of its burden of proving beyond a reasonable doubt that Robbins possessed the identification and financial information with the intent to commit a crime.[4]

The jury instructions suggesting and defining theft as a potential crime that Robbins may have intended to commit were a clear comment on the evidence, and allowed the jury to convict Robbins based on the judge's incorrect interpretation of the law of theft and identity theft. The judge's comment on the State's evidence was both presumptively and actually prejudicial. Robbins' identity theft convictions must therefore be reversed.

B. THE STATE FAILED TO MEET ITS BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT ROBBINS POSSESSED THE ITEMS OF IDENTIFICATION AND FINANCIAL INFORMATION WITH THE INTENT TO COMMIT A CRIME, WHICH IS REQUIRED TO CONVICT ROBBINS OF IDENTITY THEFT.

"Due process requires that the State provide sufficient

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[3] In enacting the identity crimes statutes, the Legislature's concern was with the significant "harm to a person's privacy, financial security, and other interests" that can result from a theft of identity or financial information. RCW 9.35.001.

[4] The prosecutor compounded this problem when she made the following argument during closing statements: "Now, the defendant being in possession of these items, there is no evidence that she was intending to give these back to the true owner. In fact, they were gathered and concealed in her purse. She never told the officers, I just found those, and I'm going to give them back. She withheld them from the true owner. That is theft. Did she possess these with the intent to commit any crime? I submit to you she did." (RP 290)

evidence to prove each element of its criminal case beyond a reasonable doubt." City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201.

To convict Robbins of identity theft, the State was required to prove that she knowingly obtained, possessed, used, or transferred a means of identification or financial information of another person, with the intent to commit, or to aid or abet, any crime. RCW 9.35.020(1).[5] The specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). However, it is well settled that where a crime requires

[5] First degree identity theft requires proof that the defendant obtained "credit, money, goods, services, or anything else of value in excess of one thousand five hundred dollars in value...." RCW 9.35.020(2). Second degree identity theft, which was charged in this case, only requires a violation "under circumstances not amounting to identity theft in the first degree." RCW 9.35.020(3).

proof of intent, bare possession alone is not sufficient. Vasquez, 178 Wn.2d at 7-8; State v. Brockob, 159 Wn.2d 311, 318, 330-31, 150 P.3d 59 (2006). Courts do not infer criminal intent from evidence that is patently equivocal. Vasquez, 178 Wn.2d at 13. That is because such an inference relieves the State of its burden to prove all of the elements of the crime beyond a reasonable doubt. Vasquez, 178 Wn.2d at 7.

For example, possession of forged instruments alone is insufficient to prove an intent to injure or defraud. Vasquez, 178 Wn.2d at 7-9; State v. Esquivel, 71 Wn. App. 868, 870, 863 P.2d 113 (1993). Possession of cold tablets containing pseudoephedrine, even when they are removed from their packaging, is insufficient to prove an intent to manufacture methamphetamine. Brockob, 159 Wn.2d 331-32. And bare possession of a controlled substance does not alone prove an intent to deliver, even when possessed in quantities greater than needed for personal use. State v. O'Connor, 155 Wn. App. 282, 290-91, 229 P.3d 880 (2010); State v. Campos, 100 Wn. App. 218, 222, 998 P.2d 893 (2000).

In this case, the State did not present sufficient evidence from which a juror could find, beyond a reasonable doubt, that Robbins intended to commit a crime using the identification or financial

information of other persons. The evidence showed that Robbins had the identification and financial information belonging to a number of other people. There was no evidence that Robbins stole these items from these other people. There was no evidence that Robbins ever used these items to obtain false identification, credit, services, or other things of value. There was no evidence that Robbins tried to sell these items to someone else who would commit such crimes. There was simply no evidence, other than her bare possession, to establish that Robbins had the intent to commit another crime.

The State's evidence was equivocal and amounted to nothing more than bare possession. This is not sufficient proof for a jury to find, beyond a reasonable doubt, the intent to commit another crime. This court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1988); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996). Accordingly, Robbins' convictions for identity theft must be reversed and dismissed.

V. CONCLUSION

By suggesting and defining the crime of theft as a potential crime that Robbins intended to commit, the trial court judge conveyed his opinion of the State's evidence and his opinion of what the State's evidence proved. This was an improper comment on the evidence. The comment was prejudicial because it was confusing, it was a misstatement of the law, and it relieved the State of its burden of presenting evidence beyond mere possession, which is required in order to convict Robbins of identity theft. Furthermore, the State failed to meet this burden, because there was no evidence that Robbins intended to commit a crime with the items of identification and financial information. For these reasons, Robbins' convictions for identity theft must be reversed.

DATED: July 9, 2014

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CERTIFICATE OF MAILING

I certify that on 07/09/2014, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Amber D. Robbins # 371916, Mission Creek Corrections Ctr., 3420 NE Sand Hill Road, Belfair, WA 98528.

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSBA #26436

APPENDIX

JURY INSTRUCTIONS 14 & 16

1/15/2014 50 470239

INSTRUCTION NO. 14

A person commits the crime of identity theft in the second degree when, with intent to commit any crime, such as theft, he or she knowingly obtains, possesses, uses, or transfers a means of identification or financial information of another person, living or dead, and obtains credit, money, goods, services or anything else that is $1500 or less in value or does not obtain anything of value.

1/15/2014 50 470241

INSTRUCTION NO. 16

Theft means:

- to wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services; or
- to appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive that person of such property or services.

CUNNINGHAM LAW OFFICE

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